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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1625

IMAGE CARRIER CORPORATION, HOUSE OF LITHOGRAPHY, INC., ASSOCIATED LITHO AND LETTERING SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH, MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

MEMORANDUM OF RESPONDENT-INTERVENOR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether a rational basis, required by the Equal Protection Clause of the Fourteenth Amendment, exists for Respondents' requirement that only union printers may bid for certain printing jobs.

Statement

This litigation concerns three printing companies with a total of four employee printers who are foreclosed from bidding for certain printing jobs by New York City, several municipal agencies and the Board of Education (a New York State agency) because of their non-union status.

The Second Circuit, reversing the finding of the District Court that no rational basis exists for the Respondent agencies' union label requirement and reversing the District Court's judgment of injunction, found that a rational basis does exist for the Respondent agencies' union label requirement.

ARGUMENT

The decision below is clearly correct.

This Court in *National League of Cities* v. *Usery*, 96 S.Ct. 2465, held that the right of each state to determine its own wage policy is an "undoubted attribute of state sovereignty" and declared unconstitutional the 1974 amendments to the Fair Labor Standards Act extending its minimum wage provisions to employees of states and their local subdivisions. Since a state has the power to act so as to *depress* the minimum wage paid for performance of state work, then surely another state has the power to act so as to seek to *uphold* the prevailing union scales, the wages and the terms and conditions of employment of persons who perform state work.

The Second Circuit, believing that sufficient rational basis for Respondents' policy exists in its fostering of collective bargaining, found that it need not question the District Court's factual finding that the challenged union label classification does not rationally further the pur-

pose of insuring that the prevailing wage rates be paid to employee printers working on municipal printing jobs. Since states have undoubted sovereignty with respect to wage policy, the degree of success which states achieve in implementing their policy is not a proper concern of the courts.

New York City may act to foster collective bargaining and did so in this case.

The Second Circuit having found that the Mayoral order restricting bidding to union printers had a purpose of fostering collective bargaining, Petitioners contend (p. 10) that "Such an imputation of purpose by the Second Circuit finds no support in the record.". What record support is needed for a finding that a restriction of bidding to union printers fosters collective bargaining? Surely such restriction could not fail to foster collective bargaining, and patently must be deemed to have a purpose of fostering collective bargaining power whenever imposed.

A municipality's acts which may have an economic impact which fosters collective bargaining are not made unlawful because of such impact. The Petitioners cite no case in support of their contention (pp. 12-13) that a municipality's act which may have an economic impact upon unionization is unlawful. The Petitioners state that the federal decisional law on this subject is "unsettled". Such decisional law in fact is virtually non-existent apart from the instant case.

There is no important question of law.

The questions presented by the Petitioners (at p. 2) are not genuine questions.

The first question presented by Petitioners—"Whether a municipality may arbitrarily preclude non-union printers from bidding on and being awarded city printing contracts . . ." assumes that such preclusion is "arbitrary". The Second Circuit found that such preclusion met the rational basis test applicable to equal protection cases involving economic matters, hence is not "arbitrary". This is a factual finding and does not raise any question of law.

The second question—whether the Congress which enacted the National Labor Relations Act "intended that a municipality be permitted to promulgate a policy, the effect of which is to force employees to affiliate with a labor organization in order for their employer to be awarded certain municipally funded contracts?"—patently is other than genuine. The National Labor Relations Act explicitly makes all duties, restrictions and prohibitions contained therein inapplicable to all governmental bodies. 29 U.S.C. 152(2).

Furthermore, the National Labor Relations Act imposes no restrictions or duties upon any organization except with respect to that organization's own employees and to unions which represent or seek to represent them.

The Petitioners incorrectly assert (p. 9) that the decision below conflicts with this Court's decisions restricting the exercise by local municipalities of police power. The decision below says nothing whatever about police power. Even if this were a "police power" case, the decision below would not conflict with any decision by this Court, because it is a finding that the Respondent agencies in fact have a rational basis for doing the acts complained of, hence do not violate the Equal Protection Clause. Since this Court never has ruled upon a similar factual question, there does not exist any decision by this Court with which the decision below could possibly conflict.

The decision of the Second Circuit does not conflict with any 'pre-emption" decision of this Court.

The Petitioners, having raised the pre-emption issue for the first time in the appeal to the Second Circuit, assert (pp. 13-15) that the decision below conflicts with decisions of this Court relating to the pre-emptive effect of the National Labor Relations Act over non-federal regulation. Petitioners err. The National Labor Relations Act sets forth the duties of employers to their employees and to unions, and the duties of unions to employers whose employees they represent and to the employees of those employers. The National Labor Relations Act imposes no restriction whatsoever against any act of any governmental body, and imposes no duty whatsoever applicable to any governmental body. 29 USC 152(2).

Petitioners' citations of *Nash* v. *Florida Indus. Commn.*, 389 U.S. 235 (1967) and *Connell Constr. Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) are not in point. In *Nash* this Court held that a state may not interfere with the enforcement machinery of the National Labor Relations Board by withholding unemployment benefits from persons solely because they filed unfair labor practice charges against their employer with the National Labor Relations Board. In *Connell* this Court held that, since the National Labor Relations Act authorizes unions to picket for union contracts which eliminate wage competition in the construction industry, a state anti-trust law prohibiting restraint of wage competition cannot nullify such union contracts. Neither *Nash* or *Connell* may reasonably be interpreted to vitiate all local government regulation merely because a provision of the National Labor Relations Act may have a tangential effect in the area regulated.

The granting of certiorari in *New York Telephone Company, et al.* v. *New York State Department of Labor, et al.* No. 77-961, does not justify granting certiorari here.

The Petitioners erroneously assert (pp. 13-14) that the Second Circuit relied upon *New York Telephone Company* as a precedent for its conclusion that the National Labor Relations Act does not pre-empt defendants' actions. The Court below merely referred to *New York Telephone Company* as a Cf. reference (p. 10a) at the conclusion of the Court's discussion of the pre-emption issue. In *New York Telephone Company* the Second Circuit rejected the employer's argument that Congress did not intend that the several states be permitted to grant unemployment compensation to strikers at the expense of the struck employer, thereby interfering with the collective bargaining process. The instant case does not involve interference with the collective bargaining process.

The briefs of amici curiae.

All three movants for leave to file briefs espouse the proposition that every employee should have the freedom of choice to refrain from joining a union. All three movants express concern that the economic effect of the decision below is to inhibit such freedom of choice. All three movants fail to mention that our national labor policy, since the National Labor Relations Act was enacted in 1935 (Wagner Act), has had a much greater inhibitory effect upon employee freedom to refrain from joining a union than has the decision below. The movants also fail to mention that the National Labor Relations Act as amended in 1947 (Taft-Hartley Act) leaves to each state the right to determine the extent to which an employee

working within its borders has a right to refrain from joining a union and keep his job.

The Wagner Act enabled employers who engage in interstate commerce to become lawful closed shops pursuant to collective bargaining. As amended by the Taft-Hartley Act, our national labor policy no longer permits employers engaged in interstate commerce to operate as closed shops but permits employers to become union shops, and authorizes each state to make union shops within its borders illegal, as follows:

> "(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 USC §164

Twenty states have made union shops illegal. Other states, with different policies relating to freedom of choice to refrain from joining unions, such as New York State, permit all employers within their borders who do not engage in interstate commerce to operate as closed shops. The majority of our states authorize employers to operate union shops—but not closed shops—whether or not they engage in interstate commerce.

All three movants in effect here seek a ruling and elicit supportive dicta which would disrupt the existing federal system, pursuant to which each state has substantial sovereignty governing the extent to which it chooses to foster collective bargaining and/or to foster freedom of each employee to refrain from joining a union.

Since no Circuit Court has held that the equal protection clause prohibits local government action that in-

hibits the freedom of an individual's choice of refraining from joining a union, directly or indirectly—let alone as a tangential effect of an economic activity as in the instant case—the movants are asking this Court to make a drastic change of our national labor policy in the guise of seeking an upholding of our national labor policy.

The brief of the National Association of Manufacturers (NAM).

NAM erroneously states that the decision below "is at variance with this Court's pronouncements" with respect to the preemptive effect of the National Labor Relations Act. More specifically NAM urges (at p. 7) that "The entire scheme of the NLRA is designed to insulate this decision-making process from unwarranted intrusions by labor or management and, although not specifically stated, it must necessarily follow that governmental bodies are likewise precluded from interfering with an employee's exercise of this right. *Cf. Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 149-150 (1976)."

In *Lodge 76* this Court held that the Wisconsin Supreme Court may not enjoin a union's concerted refusal to work overtime where the National Labor Relations Board took jurisdiction, dismissed the charge and held that the union should not be enjoined. In the instant case it is undisputed that the National Labor Relations Board could not conceivably exercise jurisdiction of any aspect of this matter.

Noting that this Court has stated that where an area of labor relations requiring national uniformity remains unregulated, the Congress may then have intended that

"the free play of economic forces" should control *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971), NAM argues that local government bidding procedures may not interfere with the forces of the market place. The Congress expressly legislated, however, that the freedom not to join a union was *not* an area requiring national uniformity. (29 U.S.C. 164, supra p. 7) Furthermore, the practice by many local governments of employing only non-union contractors discourages collective bargaining just as surely as New York City's practice encourages collective bargaining. In any event these bidding procedures are but a part and parcel of the economic forces of the market place whose play affects the choices of contractors and of their employees.

The NAM next urges (at p. 10) that the printer union label requirement is "wholly without rational nexus to a legitimate governmental objective", hence is repugnant to the equal protection clause. NAM argues that since the Mayoral Order of 1934 predated the New York State Labor Relations Act (of 1937), such Order could not have constituted a pronouncement made pursuant to the Labor Relations Act's purpose of fostering collective bargaining, hence "the Court's *ex post facto* explanation is not persuasive". Since, however, the Mayor's 1934 policy was reaffirmed by each succeeding New York City administration, the date of the first pronouncement is irrelevant.

NAM next argues that the 1934 Mayoral policy requires reexamination, gauged against contemporary standards, citing *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The fostering of collective bargaining of course remains part of this nation's labor policy and constitutes an integral element of our contemporary standards.

The NAM relies (at p. 12) upon *Master Printers Association* v. *Board of Trustees of Junior College District*

No. 508, 356 F. Supp. 1355 (N.D. Ill. 1973) in support of its attack upon the legality of "restricting the award of public contracts to only unionized firms". In *Master Printers* the District Court denied the defendant's motion to dismiss, did not mention the Fourteenth Amendment or the concepts of equal protection or due process, and relied upon Illinois State cases, referring to their ancient vintage and concluding that "indications are that they still represent the law in this State". Whether restricting of public contract bidding to unionized firms violates the laws of some of the several states of course is not a concern of this Court in this case.

NAM finally states (at pp. 13-14) that the policy which the Second Circuit refused to enjoin may violate the Sherman Act, and asserts that the Mayoral Order works to restrict the award of the City's printing contracts to a "small fraction of its eligible bidders". Assuming arguendo that every non-union printing firm in New York City otherwise is an eligible bidder, at least 42% of the City's printers are eligible to bid now, and the others are eligible as soon as they choose to unionize. Whether the action of a municipality is subject to the Sherman Act dedends upon whether it reflects state policy. *City of Lafayette* v. *Louisiana Power and Light Co.*, 46 U.S.L.W. 4265 (March 29, 1978). If the Sherman Act is being violated by Respondents' union label requirement, both the United States Attorney and the Petitioners of course are free to proceed thereunder.

The brief of the National Right to Work Legal Defense Foundation.

The amicus curiae brief of the National Right to Work Legal Defense Foundation advocates the "legal rights of employees". No employee has joined this action. This

brief also contends that the First Amendment guarantees a "constitutional right of non-association", and cites *Evans* v. *Newton*, 382 U.S. 296 (1966) and *Illinois State Employees Union* v. *Lewis*, 473 F.2d 561 (7th Cir. 1972, *cert. denied*, 410 U.S. 928 1973). *Evans* is irrelevant here. The only reference in *Evans* to a right of non-association in this Court's dictum that a private golf club "restricted to either Negro or white membership" is an instance of expression of freedom of association. *Illinois State Employees Union* likewise is irrelevant here, having involved a discharge of a state employee for refusing to change his allegiance from Democratic to Republican.

The contention that a labor policy which fosters collective bargaining violates the First Amendment is frivolous. The First Amendment never has been held to guarantee the freedom *not* to associate. Were the law otherwise, the National Labor Relations Act's encouragement of collective bargaining and its authorization of "union shops" itself would violate the First Amendment.

The brief of the Center on National Labor Policy.

The brief of the Center on National Labor Policy focuses upon the affixing of union labels to flat form sheets printed for the Respondents and cites *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In *Wooley* the issue on appeal was whether the State of New Hampshire may Constitutionally enforce criminal sanctions against George and Maxine Maynard, followers of the Jehovah's Witnesses faith, who covered the motto "Live Free or Die" on their passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs. The union label is a barely visible mark which may be

obliterated by the stroke of a pen on any sheet of paper prepared for New York City without fear of criminal sanction. In any event said union label does not, as the brief amicus asserts, "tell(s) all the world that the government does not permit non-union laborers to work on the printing of such forms" but merely advises persons aware of the label's significance that union labor produced that particular sheet of paper.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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